

No. 18729 ✓

IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

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BANK OF AMERICA NATIONAL TRUST AND SAVINGS  
ASSOCIATION,

*Appellant,*

*vs.*

JAMES A. A. SMITH, etc.,

*Appellee.*

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**APPELLANT'S OPENING BRIEF.**

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**FILED**

NOV 12 1963

FRANK H. SCHMID, CLERK



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## APPELLANT'S OPENING BRIEF.

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### I.

### JURISDICTIONAL STATEMENT.

This matter arose as a result of a Petition in Reclamation filed by Appellant, Bank of America National Trust and Savings Association (herein called "Bank"), in the Bankruptcy Court against Appellee, James A. A. Smith, Trustee in Bankruptcy of Conair, Inc., Bankrupt (herein called "Trustee"). The Petition in Reclamation by Bank claims payment from the Trustee of moneys coming into his possession as a result of collections by him on accounts receivable of Conair [Tr. 20-28]. The Bank is assignee of written assignments of Conair account receivable moneys [Tr. 30 and 34]. The Referee in Bankruptcy signed Findings of Fact, Conclusions of Law and an Order that the Bank should

pay the sum of \$21,554.66 to the Trustee for account receivable moneys that the Bank has collected and that upon receipt of that sum the Trustee should pay to the Bank the sum of \$23,509.90 for account receivable moneys that he has collected [Tr. 39-43]. The Bank filed a Petition for Review and, on March 6, 1963, Judge Westover filed and entered an Order Affirming the Referee's Order [Tr. 57-58]. On April 4, 1963 the Bank filed its Notice of Appeal to this Court [Tr. 60-61].

The jurisdiction of the United States Court of Appeals was invoked pursuant to the provisions of Section 1291, Title 28 and Section 47, Title 11, United States Code.

## II.

### STATEMENT OF THE CASE.

The Bankrupt, Conair, Inc. (herein called "Conair"), filed a debtor's Petition under Section 322 of Chapter XI of the Bankruptcy Act on November 1, 1960 [Tr. 20 and 30], and, thereafter, on January 4, 1961 it was adjudicated a bankrupt [R. 18].

Prior to the bankruptcy proceedings the Bank had loaned the sum of \$109,000.00 to Conair for which Conair had given its promissory note to the Bank, dated July 22, 1960, in that principal amount [Tr. 21 and 30]. As a method of providing for the repayment of this debt, Conair assigned to the Bank the proceeds of its accounts receivable that were to result from the manufacture of goods by Conair for its customers under contracts that it had with them, and Conair between September 22, 1960, and November 1, 1960, executed instruments that assigned to the Bank "all



monies now due or which may hereafter become due to the assignee from" Conair's named customers [Tr. 30 and 34].

This arrangement for the assignment of the accounts receivable from Conair to the Bank was further confirmed by Notice of Assignment of Accounts Receivable dated September 21, 1960 that was filed with the County Recorder in the County of Los Angeles, State of California on September 22, 1960 [Tr. 21 and 30]. Payments were received by the Bank on that promissory note and on September 28, 1960 the principal unpaid balance on it was \$69,000.00 [Tr. 21 and 30].

A renewal note in the principal sum of \$69,000.00 was given by Conair to the Bank on September 28, 1960 [Tr. 21 and 30]. The present unpaid balance of the outstanding, renewal note, dated September 28, 1960, after application of all payments received by the Bank, is the sum of \$24,654.68 and interest [Tr. 30].

The Trustee went out to Conair's place of business on either October 31 or November 1, 1960 [R. 7], and he testified that he determined as follows:

"There were orders that were unfilled, stock that was purchased for these unfilled orders, and in determining between ourselves it would be best for the benefit of the creditors to convert this into completed merchandise and invoice it out and that we would satisfy the customers and bring more benefit to the creditors, an order was obtained to go ahead and operate the business" [R. 16].

The Trustee was appointed Receiver of Conair on November 2, 1960, one day after its debtor's Petition

was filed, and the Order of Appointment also authorized the Trustee, as receiver, "to continue and carry on with the business as conducted by the said Debtor until further Order of this Court" [Tr. 2-3].

The Trustee did continue the operation of the business of Conair, and on November 22, 1960 he filed his report of operations for November 1 to November 15, 1960 in which he stated that: "Prior to the filing of the plan of arrangement the Debtor had assigned their accounts receivable to the Bank of America for the purpose of securing a purported prior unsecured indebtedness" [Tr. 5], and further stated that "Among the assets turned over to your Receiver was work in process of \$96,606.03 which will be consumed in the operation and can be accounted for under the cost of materials on the reports" [Tr. 6].

On a Petition dated November 7, 1960, it was ordered by the Bankruptcy Court on November 23, 1960 that the Trustee, as Receiver, was authorized to employ the President of Conair, Robert F. Feland, as the General Manager of the operation of Conair [Tr. 14-15]. According to the Trustee's testimony he instructed Feland as follows: "That we had a certain amount of merchandise and materials purchased for these different customers, which, in the usual procedure, was valuable, but we had merchandise on the shelves which would bring us overproduction unless we shipped it. I told him if they needed to, to go ahead and sell it or *if these contracts were still good* and they would accept them, to go ahead and convert the material and work in process on hand to complete merchandise to delivery" [R. 40-41; emphasis added].



The Trustee was appointed as trustee of Conair on January 4, 1961 [R. 19], and the Referee's Order of January 5, 1961 authorized the Trustee to continue the current operation of the business of Conair [Tr. 16-17].

According to the two written stipulations [Tr. 29-35] signed and filed by the Trustee and the Bank, the method by which the account receivable moneys were generated, to which the Bank makes claim by virtue of its assignments, was as follows:

Conair entered into basic contracts with its customers relating to the manufacture of goods by Conair; from time to time the customers would issue job purchase orders to Conair that requested the delivery of specific goods manufactured by Conair; when the goods were delivered by Conair to the customers, invoices would be sent to the customers [Tr. 30].

The Trustee, according to the written stipulations [Tr. 30 and 34], has collected and retains possession of the total sum of \$55,301.35 from customers of Conair for products manufactured according to purchase orders received by Conair prior to November 1, 1960 under these basic contracts. A part of that total amount of \$55,301.35 collected by the Trustee, the sum of \$23,509.90, came from the collection of accounts receivable for goods manufactured and delivered by Conair before November 1, 1960 [Tr. 30-31].

On the other hand, the Bank itself has collected on some other accounts receivable, and the Bank has thereby obtained the total amount of \$21,554.66 that was paid by customers of Conair for goods delivered and invoiced by the Trustee after November 1, 1960 [Tr.

31]. A part of that amount so collected by the Bank, the sum of \$11,450.59, was paid on accounts receivable by Conair's customer, Litton Industries, Inc., on three invoices [Tr. 31-32]. The manufacture of the goods for these Litton Industries accounts receivable was commenced prior to November 1, 1960 and completed after that date [Tr. 31-32]. The basic contract for the delivery of those goods to Litton Industries, as with the other accounts receivable, was entered into by Litton Industries and Conair before November 1, 1960, and the three invoices for these accounts receivable were dated, respectively, November 4, 10 and 14, 1960 [Tr. 31-32].

There has been no contention by the Trustee or his counsel that the Trustee entered into new contracts for the manufacture of the goods from which he collected the \$55,301.35 [R. 36-37], but the Trustee attempted to show that it was not his subjective intention to assume Conair's contracts with its customers under which the Bank is entitled to sufficient proceeds to pay its promissory note [R. 12-13].

Nevertheless, the Trustee, even in his attempt to explain his position in the dispute with the Bank that started in November, 1960, testified that: "It has always been our custom, when we take and go in, to complete the work in process, if it is profitable, by an order of the court. We operate to convert into merchandise that work in process, invoice it to the customer, as far as the job orders go, and deposit the monies in the bank" [R. 30]. More specifically, the Trustee testified in answer to a question as to whether he had attempted to negotiate any new contracts as follows: "No, only the new purchase orders that would

come in following this, or where a salesman would go out and get new orders" [R. 35]. He further testified that the new orders to which he referred were not related to the \$55,301.35 from which the Bank claims [R. 35].

The Referee in Bankruptcy signed and filed findings that the Trustee did not intend to nor purport to assume the executory contracts between Conair and its customers under which the accounts receivable proceeds were assigned to the Bank, despite the written stipulations between the Trustee and the Bank which were incorporated into the findings and the Trustee's own testimony, and also that the Trustee had not applied to the Court for authority to assume any executory contracts, and the Referee concluded that the executory contracts had been rejected by the Trustee [Tr. 40-42].

The Order of the Referee in Bankruptcy was affirmed by the District Court on Review, without a written opinion and the Findings of Fact and Conclusions of Law of the Referee were adopted [Tr. 57-58].

The order from which the Bank appeals to this Court is that the Bank shall pay to the Trustee the sum of \$21,554.66, the amount of money collected by the Bank on accounts receivable for goods completed and delivered after November 1, 1960, and that the Trustee, in turn, shall upon receipt of that sum, pay to the Bank the sum of \$23,509.90 as the amount of accounts receivable money collected by the Trustee upon which the goods were delivered prior to the filing of Conair's petition as a debtor on November 1, 1960 [Tr. 43 and 58].

III.

**SPECIFICATIONS OF ERRORS.**

The Order Affirming Referee's Order of December 27, 1962 is contrary to the facts and law because:

The Trustee assumed and performed executory contracts that Conair had with its customers for the delivery of goods, and the resulting account receivable moneys, that Conair had assigned to the Bank, belong to the Bank in an amount sufficient to pay the Conair promissory note.

IV.

**SUMMARY OF ARGUMENT.**

The Bank's entitlement to payment from assigned account receivable moneys in an amount sufficient to pay the balance on the Conair promissory note follows from the two written stipulations of facts between the Trustee and the Bank and the Trustee's own testimony, including oral stipulations pertaining thereto, the Orders of the Bankruptcy Court for the operation of the business of Conair by the Trustee, and the failure of the Trustee to deny the allegations of the Petition in Reclamation. The application of the facts to the law means that the Trustee, by assuming and performing the executory contracts, thereby became obligated to the Bank on its assignments.



V.

ARGUMENT.

1. The Facts That Are Really Undisputed Show That the Trustee Assumed and Performed the Executory Contracts, and This Court May so Determine.

The Trustee assumed and performed executory contracts under which the Bank is entitled to receive payment under its assignments of accounts receivable. This Court is entitled to examine the written stipulations between the Trustee and the Bank, which the Trustee's own testimony fully support, and arrive at its own conclusion concerning whether or not the Trustee assumed the executory contracts of Conair. In the case of *Tepper v. Chichester*, 285 F. 2d 309 (9th Cir. 1960), which was also a bankruptcy reclamation case, the court said (p. 312):

"In a case such as this, where there is no real dispute as to the facts, we may examine the issues and arrive at our own conclusions from such given state of facts."

The written stipulations demonstrate without contradiction that the Trustee performed and assumed the executory contracts and, moreover, the Findings of Fact by the Referee, adopted by Judge Westover, incorporated those stipulations as some of the Findings of Fact [Tr. 40 and 57-58]. The further finding that the Trustee did not intend to assume any executory contracts but merely filled job orders to liquidate the assets [Tr. 40-41] is immaterial under the applicable law and contrary to the stipulated facts.



The Trustee himself testified many times to the effect that he did perform the executory contracts. On one occasion the Trustee testified as follows: "After being appointed Receiver and obtaining an order to continue operation and to complete the work in process, it was completed and delivered and I invoiced the customers" [R. 8]. The written stipulations were referred to at the hearings in the Bankruptcy Court in which counsel for the Bank asked the Trustee as follows: "As to the figure \$55,301.35 which is referred to in the original stipulation on page 2, at line 24, and then further in the supplemental stipulation on page 1, *you entered into no new purchase orders or contracts in connection with any of those accounts receivable? Is that a correct statement?*" [R. 36; emphasis added]. Thereupon counsel for the Trustee stated: "*We have stipulated that is a correct statement, Mr. Taylor*" [R. 37; emphasis added]. It was further stipulated by the Trustee's counsel that the Trustee had not filed any report with the Court stating that he had rejected any executory contracts [R. 94].

The Orders of the Bankruptcy Court specifically authorized the Trustee to continue and carry on with the business of Conair [Tr. 2-3 and 16-17], and the entire record shows that this is what the Trustee did.

Not only do the stipulations show that the Trustee assumed and performed the executory contracts, but the Trustee filed no answer to the Bank's Petition in Reclamation which alleges that the Trustee collected \$55,301.35 upon accounts receivable assigned to the Bank by Conair and upon which the related contracts therefor were entered into by Conair and the account receivable obligors prior to November 1, 1960 [Tr. 21-22].

2. There Is No Requirement That the Bankruptcy Court Must Have Expressly Authorized the Trustee to Assume the Executory Contracts, and His Assumption Made Him Liable to the Bank on Its Assignments.

The case most similar to this one is *In re Italian Cook Oil Corp.*, 190 F. 2d 994 (3rd Cir. 1951), in which one of the Trustees contended that the performance of the contract did not constitute an adoption of it by the Trustees so as to subject them to a claim under the assignment. The Court in the *Italian Cook Oil* case, *supra*, held that the performance of the executory contract constituted an adoption of it and that the Trustees were bound under the valid equitable assignment of the proceeds of the contract to the assignee-bank; the court said (p. 996):

“By Section 70, sub. b of the Act, the trustee is given the right to adopt or reject an executory contract. He must do one or the other. If the trustee deems the contract to possess no equity or benefit for the estate he rejects it as burdensome. If, on the other hand, he concludes that the executory contract does have an equity for the estate he adopts it. These principles of law have become too well established to permit of doubt.”

The Court further said in the *Italian Cook Oil* case, *supra* (p. 997):

“The trustee, however, may not blow hot and cold. If he accepts the contract he accepts it *cum onere*. If he receives the benefits he must adopt the burdens. He cannot accept one and reject the other.”

The case of *In re Tidy House Products Co.*, 79 F. Supp. 674 (S.D. Iowa, 1948) held that the trustee

had impliedly assumed the executory contract by acceptance of the benefits of it and that he was, therefore, liable for the burdens of paying the money due under it. The Court in the *Tidy House* case, *supra*, concerning rejection of executory contracts under Section 70, sub. b, of the Bankruptcy Act said (p. 676):

“Nothing appears that would indicate that the trustee had made such an election with reference to this executory contract or that the trustee had filed the report as required by the provisions of the Act just set out, or has abandoned the contract as burdensome.”

The *Tidy House* case further says (p. 676):

“When a trustee adopts an executory contract, he assumes the liabilities. \* \* \* If the contract is rescinded, then there would in effect be an abandonment of the entire contract and the bankrupt estate could have no benefits therefrom.”

There are other cases in which the courts have held that the assumption of the executory contracts created a duty to perform the burdens. In the case of *In re DeLong Furniture Co.*, 188 Fed. 686 (E. D. Penn., 1911) the Court said (pp. 686-687):

“Neither the receiver nor the trustee was bound to adopt and complete the contracts, and, if neither had undertaken to complete, there would have been no money to which the furniture company’s assignment could apply, and the bank would have been compelled to accept the situation. But the receiver and the trustee did adopt and did carry out the contracts, and in my opinion they stepped thereby into the furniture company’s shoes \* \* \*.”

Also in the case of *In re Swindle*, 188 Fed. Supp. 601 (Ore. 1960), the Court held that the trustee by adoption of the contract thereby became liable to accept the burdens with the benefits of it.

There are a number of cases in which the courts have held that the trustees by their conduct in performing executory contracts had thereby adopted them. In the case of *In re Public Ledger, Inc.*, 161 F. 2d 762 (3rd Cir. 1947), the Bankruptcy Court had ordered the trustees to continue the operation of the business, but the business was thereafter shut down before the employees could take their vacations and they filed claims for vacation pay; the Court held that the contract of employment had been assumed by the trustees and said (p. 765):

“The denial of the claims was upon the ground that the contract providing for vacation with pay had never been assumed by the trustees, and upon the further ground that the contract could not be assumed legally without the court’s specific authorization, which was never given.”

The Court in the *Public Ledger* case, *supra*, answered the contentions of the trustees and said (p. 765):

“The evidence is all one way, however, that no act of the trustees was inconsistent with the terms of the contract, and that every act of the trustees in relation to the employees was in complete accord with its terms.”

The Court in the *Public Ledger* case, *supra*, further said (p. 765, footnote No. 1):

“It should be noted that the Act does not specify the manner of acceptance of an executory con-



tract. Though a trustee must list all executory contracts within sixty days as well as which of them have been rejected, it is not clear as to the manner of showing those executory contracts which have been accepted. Acceptance may be by conduct as well as by a writing or by oral statement."

The Court in the case of *In re McCormick Lumber & Mfg. Corp.*, 144 Fed. Supp. 804 (Ore. 1956), held that the trustee had assumed a conditional sales contract and said (p. 805):

"In other words, the trustee is given a sixty day breathing spell within which to determine whether or not the estate should abandon a 'white elephant' or perform a beneficial contract, and, further, relieves the bankrupt's estate from accumulating liabilities unless the trustee takes 'affirmative' action."

It was held in the case of *In re Forger Metal Products*, 229 F. 2d 799 (3rd Cir. 1955), that by the acts of the trustee and the implications of the Order of the Bankruptcy Court, the trustee had assumed the executory contract and the Court said (p. 801):

"As we view it the entire record points to assumption of the contract in substantial compliance with Section 70, sub. b."

The Bankruptcy Court in the instant case, as in the *Forger Metal Products* case, *supra*, gave the trustee implicit authority to assume the executory contracts under its Order of November 2, 1960 whereby the receiver was "authorized and empowered to continue and carry on with the business as conducted by the said Debtor \* \* \*" [Tr. 3].



The case of *In re Luscombe Engineering Company*, 268 F. 2d 683 (3rd Cir. 1959), strongly relied upon by the Trustee, does not support the proposition that Section 70, Sub. b, of the Bankruptcy Act requires an Order of the Bankruptcy Court for the assumption of an executory contract, otherwise there would have been no reason for the court in that case to have discussed in detail the actions by the trustee that were contended to have constituted an assumption of the executory contracts. The Court in the *Luscombe* case, *supra*, held that there had not been an assumption of the executory contracts, but in that case the trustee had entered into subsequent agreements, transactions, bargaining and newly agreed methods for payment. This course of negotiations and subsequent agreements between the trustee and the other parties to the executory contracts is set forth in the *Luscombe* case, 268 F. 2d at page 686; the Court also said (p. 686):

“It is to be emphasized that we have here no express or even clearly implied assumption of a bankrupt’s contract. The claimant’s argument at most suggests ambiguous conduct by trustee and contractor which makes at least as much sense interpreted as a new contract as it does interpreted as an assumption of the old.”

In the instant case the trustee assumed and performed the executory contracts under which the account receivable moneys had been assigned by Conair to the Bank, according to the Trustee’s stipulations and testimony. There was no evidence whatever that the Trustee entered into new and different contracts, and, in fact, it was stipulated that he did not [R. 36-37].

**3. The Bank Is Entitled to Sufficient Proceeds From Account Receivable Moneys to Pay the Conair Promissory Note.**

The Bank has collected the sum of \$21,554.66 in account receivable moneys that the Bankruptcy Court has ordered it to pay over to the Trustee. The Bank is entitled to retain a part of that amount, the sum of \$11,450.59, which was paid to the Bank by Conair's customer, Litton Industries, Inc., on the three invoices dated respectively November 4, 10 and 14, 1960. It was stipulated by the Trustee that the basic contract for the delivery of the goods, which were partly manufactured prior to November 1, 1960, on those accounts receivable, was entered into between Litton Industries, Inc. and Conair prior to the date of November 1, 1960 [Tr. 31-32].

Under Section 313, sub. (1), Chapter XI, of the Bankruptcy Act, executory contracts can only be rejected by an order of the Bankruptcy Court upon notice to the parties to such contracts. There was no order of the Bankruptcy Court permitting the Trustee, as receiver or trustee, to reject the executory contract with Litton Industries, Inc., and Conair was not adjudicated a bankrupt until January 4, 1961 [R. 18]. The Bank is, therefore, entitled to retain the sum of \$11,450.59 collected by it on the Litton Industries, Inc. assignment of accounts receivable and to receive from the Trustee, from the fund of \$55,301.35, a sufficient additional amount to pay the Conair promissory note.

VI.

CONCLUSION.

The Bank loaned the sum of \$109,000.00 to Conair within a few months prior to the time that it filed a Debtor's Petition under Chapter XI of the Bankruptcy Act and took from Conair assignments of account receivable moneys, to come from executory contracts, as security for the loan and as a method of repayment. The Trustee assumed the benefits of the operation of the business of Conair and its executory contracts which had been financed by the Bank. The Trustee by such assumption also became subject to the liability to the Bank on its assignments. The Bank should receive payment of its promissory note, and the Trustee should retain the balance of substantial benefit derived from the operation of the business.

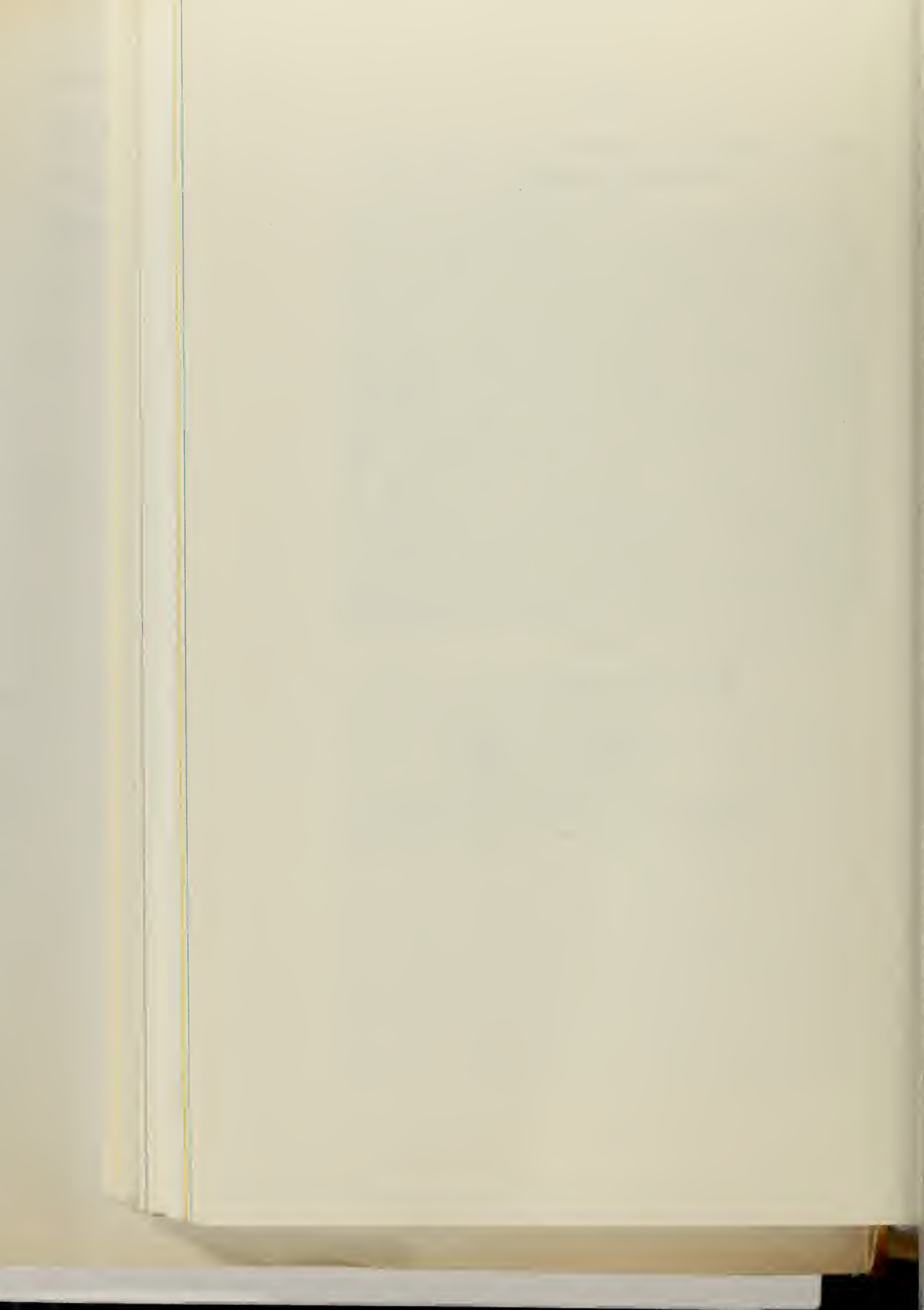
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**Certificate.**

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

HARRIS B. TAYLOR,



